

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SEAN O'NEILL.

Petitioner,

V.

STU SHERMAN,

Respondent.

Case No.: 3:15-cv-02912-H-PCL

ORDER:

(1) DENYING PETITION FOR WRIT OF HABEAS CORPUS

[Doc. No. 1]

(2) ADOPTING REPORT AND RECOMMENDATION

[Doc. No. 8]

(3) DENYING CERTIFICATE OF APPEALABILITY

On December 25, 2015, Petitioner Sean O'Neill, a state prisoner convicted of attempted murder in connection with a street gang, filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1.) Petitioner argues that there is insufficient evidence to support his conviction as an aider and abettor in the attempted murder. (Id. at 6.)

Background

I. Procedural History

3 In July, 2012, a jury convicted Petitioner of the attempted murder of Robert Romero
4 for the benefit of a criminal street gang (Count 1). (Doc. No. 6-2, Lodg. No. 1 at CT 423.)
5 The jury found that Petitioner committed the crime willfully, deliberately, and with
6 premeditation, and that Petitioner was a principal in the offense.¹ (Id. at CT 423–24.)
7 Petitioner was also convicted of the attempted murder of Chula Vista Police Department
8 (“CVPD”) Agent Ricardo Cruz (Count 2), assault with a deadly weapon on a peace officer
9 (Count 3), resisting an executive officer (Count 4), and evading an officer with reckless
10 driving (Count 5), all committed in association to a street gang. (Id. at CT 425–28.)

11 On appeal, Petitioner contended that there was insufficient evidence to support his
12 conviction on Count 1 as an aider and abettor, and that there was insufficient evidence to
13 support his convictions on the remaining counts based on a theory of natural and probable
14 consequences. (Doc. No. 6-12, Lodg. No. 3 at 10–13.) The California Court of Appeal
15 affirmed Petitioner’s conviction and sentence on Count 1, but reversed the convictions on
16 Counts 2 through 5 on the ground of insufficient evidence. (Doc. No. 6-14, Lodg. No. 5
17 at 3–4, 32.) Petitioner was sentenced to a total term of four years, plus fifteen years to life
18 with the possibility of parole, plus twenty-five years to life with the possibility of parole.
19 (Doc. No. 6-3, Lodg. No. 1 at CT 512.) On October 1, 2014, the California Supreme Court
20 summarily denied Petitioner’s petition for direct review of Count 1. (Doc. No. 6-16, Lodg.
21 No. 7.)

²⁴ ¹ The jury found that at least one principal personally used a handgun and proximately caused great bodily injury. (Doc. No. 6-2, Lodg. No. 2 at CT 424.) Petitioner was tried as an aider and abettor in the attempted murder of Romero. According to California law, “[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.” Cal. Penal Code § 31.

1 On December 25, 2015, Petitioner timely filed the present federal petition for a writ
 2 of habeas corpus before this Court, again arguing there was insufficient evidence to support
 3 his conviction on Count 1. (Doc. No. 1 at 6.) On March 8, 2016, Respondent filed an
 4 answer and lodged the relevant state court records. (Doc. Nos. 5, 6.) On April 14, 2016,
 5 Petitioner filed a traverse. (Doc. No. 7.) On May 10, 2016, the magistrate judge issued a
 6 report and recommendation recommending denying the petition. (Doc. No. 8.) On June
 7 1, 2016, Petitioner filed an objection to the report and recommendation. (Doc. No. 9.) For
 8 the reasons set forth below, the Court denies the petition for a writ of habeas corpus and
 9 adopts the magistrate judge's report and recommendation.

10 **II. Factual History**

11 The Court adopts the facts from the California Court of Appeal's opinion denying
 12 Petitioner's direct appeal and affirming his conviction. (See Doc. No. 6-14, Lodg. No. 5.)
 13 This Court, pursuant to 28 U.S.C. § 2254(e)(1), presumes the following facts to be correct:

14 **A. The People's Evidence**

15 At approximately 1:00 a.m. on April 23, 2011, Robert Romero stepped outside
 16 of Wild Woolly's bar on the corner of Broadway and Davidson in Chula Vista
 17 to make a phone call. Romero walked across the street to get away from the
 18 noise from the bar. After crossing the street, Romero saw two, or possibly
 19 three, men walk out from the alley behind the bar, coming toward him. As
 20 the men approached, one asked Romero "Where are you from?" and said
 21 "F*** VCV." Before Romero could respond, one of the men shot Romero
 22 twice in the chest. Romero fell to the ground. The men continued to approach
 23 Romero as he crawled backward, yelling at the shooter to stop. The same man
 24 shot Romero three more times, in the side, stomach and leg. The men then
 25 ran away. At trial, Romero testified that he could not identify the shooter, but
 26 said that the man's size and skin color matched Martinez's. One of the bullets
 27 pierced both of Romero's lungs and one of his lungs collapsed. Two bullets
 28 remain lodged in Romero's back and one is his left leg. Romero was
 hospitalized for almost a month. At the time of trial, he continued to
 experience constant pain.

After the perpetrators fled, Romero managed to stand up and begin walking
 back toward Wild Woolly's. Around the same time, Agent Cruz was
 patrolling the area near Wild Woolly's and saw a crowd gathering at the
 intersection of Broadway and Davidson. Agent Cruz turned onto Davidson,

1 where a bystander told him that someone had been shot. As Agent Cruz was
2 asking the bystander for more information, Romero walked up to Agent
3 Cruz's car and pulled open his shirt, revealing the gunshot wounds. Romero
4 told Agent Cruz that he had been shot. As Agent Cruz picked up his
5 microphone to call for help, several members of the crowd were pointing to
6 East Park Lane, the alley behind the bar where cars were parked. Agent Cruz
7 told Romero that help was on the way and then drove toward the alley, where
8 he saw a car's brake lights, and then its reverse lights, turn on. Agent Cruz
9 could hear people in the crowd shouting "That's the car. They are over there.
10 They are in that car."

11 Agent Cruz followed the car as it headed north on East Park Lane. When
12 Agent Cruz caught up with the car, a white Toyota Solara, he turned on his
13 police cruiser's overhead lights. The Solara did not pull over. As Agent Cruz
14 continued following the car, he radioed the direction of travel and a
15 description of the Solara and its license plate number. The Solara ran through
16 a stop sign, but then slowed down as Agent Cruz approached. Fearing an
17 ambush, Agent Cruz hung back. The car then abruptly accelerated to 30 or
18 40 miles per hour. Agent Cruz followed the Solara, maintaining a distance of
19 10 to 15 yards. The Solara turned onto Beech Avenue and Agent Cruz again
20 radioed the direction of travel and turned on his siren. The Solara sped
21 through two more stop signs and bottomed out twice, sending sparks from
22 under the car. The Solara then turned onto Madrona Street, a cul-de-sac, and
23 drove slowly down the street and around the loop.

24 Agent Cruz followed the Solara onto Madrona, but stayed in the straight part
25 of the road, facing the loop. Agent Cruz stopped his car close to the left side
26 of the street, next to a parked truck. Agent Cruz positioned his patrol car so
27 that the driver of the Solara would be forced to exit the loop of the cul-de-sac
28 on the right, passing the patrol car on its passenger side, if he attempted to
flee. When Agent Cruz pulled his car into position, the Solara stopped and
faced him. Agent Cruz saw a male driver and O'Neill in the passenger seat.
Agent Cruz testified that he made eye contact with both men and that neither
man reacted or showed any emotion. The driver of the Solara pulled the car
out of Agent Cruz's field of vision. Agent Cruz got out of his patrol car so
that he could see the Solara. The Solara was facing Agent Cruz. Agent Cruz
again made eye contact with both men, drew his gun and pointed it at the
driver. Agent Cruz shouted repeatedly at the men to show their hands and
turn off the car.

29 The driver of the Solara revved the car's engine and drove directly at Agent
30 Cruz. Agent Cruz fired his gun at the car five times in rapid succession. The
31 Solara remained on its path toward Agent Cruz, who attempted to take cover

1 inside his patrol car. The Solara hit the driver's side door of Agent Cruz's
2 patrol car, which in turn hit Agent Cruz and sent him head first into the roof
3 of the patrol car. Agent Cruz momentarily lost consciousness. The Solara ran
4 over Agent Cruz's leg and foot, crushing part of his leg between the car door
5 and frame. Agent Cruz radioed for help. He saw the Solara behind him,
6 heading out of the cul-de-sac. CVPD officer, Eric Thunberg, responded to
7 Agent Cruz's call and headed to Agent Cruz's location. Thunberg saw the
8 Solara make a wide right turn onto Beech from Madrona. He later identified
9 Martinez as the driver of the car. Because Thunberg had just heard Agent
10 Cruz's radio call reporting that he was hurt, Thunberg went to assist Agent
11 Cruz rather than pursue the Solara.

12 Agent Cruz's injuries included a broken left foot, crushed shin, soft tissue
13 damage to his left knee, hip and right arm, a concussion, bruises on his face,
14 head and chest and cuts to his right arm and chest from the patrol car's door.
15 Agent Cruz continued to experience pain and discomfort at the time of the
16 trial.

17 Shortly after Agent Cruz left Wild Woolly's to pursue the Solara, another
18 police officer arrived at the bar. He saw a crowd outside and Romero lying
19 on the ground. Someone in the crowd shouted that one of the men who had
20 approached Romero was wearing a Padres jacket. Romero could not recall
21 what the suspects had been wearing. Additional police officers arrived to
22 contain the scene and begin an investigation. Six .22 caliber ammunition
23 rounds, including one unfired cartridge and five fired casings, were found in
24 a dumpster in the alley next to Wild Woolly's. The bar's video surveillance
25 footage from the timeframe of the shooting showed two people walking out
26 of the alley and then running back down the alley. The video also showed
27 someone opening the dumpster and placing something inside. In addition, the
28 video had footage of Agent Cruz's patrol car turning down the alley and
proceeding northbound. After cordoning off the path of Agent Cruz's pursuit,
police found a knife and a loaded revolver in the gutter.

29 Fingerprints were found on the gun, but they did not have enough detail to be
30 identified. When tested, the gun fired only intermittently. It was determined
31 that the expended cartridges found in the dumpster had come from the
32 revolver that police found in the gutter. Martinez's brother was the owner of
33 the Solara. When questioned by police on the morning of April 23rd, he told
34 the officers that Martinez had borrowed the car the night before and had not
35 yet returned it. The Solara was found later that day, parked in a walkway near
36 a church. There was a bullet hole in the hood of the car. Inside the car, police
37 found a box containing .22 caliber cartridges that were consistent with the
38 casings found in the dumpster. O'Neill's fingerprints were found on the

1 Solara's passenger's side door and Martinez's palm print was found on the
 2 hood. Investigators also found Martinez's DNA on the steering wheel and the
 3 driver's side door, and on a nearby picnic table and wall. Additionally, a Vons
 4 receipt for a six-pack of beer dated April 22 at 7:39 p.m., which police found
 5 near the Solara, corresponded with video surveillance footage from Vons that
 6 depicted two men dressed like the men seen running down the alley in the
 Wild Woolly's surveillance video. One of the men shown on the recording
 was wearing clothing that matched the clothing found in O'Neill's home.

7 At trial, CVPD detective Bryan Maddox testified as an expert on criminal
 8 street gangs. Maddox identified both O'Neill and Martinez as longtime
 9 members of the Otay criminal street gang.² Maddox testified that the Otay
 10 gang is a rival of the Varrio Chula Vista street gang, or VCV, which claims
 11 Wild Woolly's as part of its territory. He stated that gang members go into
 12 rival gang territory to commit crimes and to expand their own territory.
 According to Maddox, because of the danger associated with going into rival
 territory, gang members on such missions might not wait to find a known rival
 gang member to assault. Instead, they assault anyone who they think may be
 13 associated with the rival gang.

14 Maddox told the jury that committing a crime involving a police officer, even
 15 just running away from police, is a crime that elevates a gang member's status.
 16 Further, "[c]ommitting a violent assault against [a law enforcement] officer,
 17 [particularly] on the heels of committing another violent assault, . . . is
 considered the cream of the crop when it comes to gang crimes. . . ." Maddox
 18 testified that murders of rival gang members and police officers, as well as
 evading police, are crimes that are committed for the benefit of the gang.

19 ² Both men had admitted to being Otay members and they were
 20 documented as gang members by the CVPD, as well. O'Neill also
 21 stipulated to being a gang member. He has multiple gang-related
 tattoos, including one on his head that reads "F*** CV" and another
 across his stomach that says "Otay."

22 B. The Defense

23 Defense counsel argued that neither Martinez nor O'Neill was involved in the
 24 shooting of Romero. Both counsel stressed that there were no eye witnesses
 25 to the shooting. Defense counsel posited that the shooter could have been an
 26 enemy of Romero who had recently been released on bail for alleged heroin
 27 distribution, and who had also recently testified as a witness in a murder trial.
 With respect to the attempted murder of Agent Cruz, Martinez's counsel
 28 argued that Martinez was merely trying to evade Agent Cruz and did not
 intend to harm him. Counsel theorized that Martinez tried to evade Agent
 Cruz because he feared being caught drinking and driving, particularly

1 because he was not yet 21. Martinez's counsel told the jury that Martinez had
 2 driven toward Agent Cruz, rather than around him, because he was trying to
 3 avoid being shot by Agent Cruz. O'Neill's counsel contended that there was
 4 no reliable evidence that O'Neill was in the car at the time it hit Agent Cruz,
 5 and that even if O'Neill was in the car, the prosecution failed to establish that
 O'Neill had done anything that would make him liable as an accomplice to
 the crimes.

6 (Doc. No. 6-14, Lodg. No. 5 at 4-10.)

7 **Discussion**

8 **I. Legal Standards**

9 Since Petitioner filed the present federal habeas petition after April 24, 1996, the
 10 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the petition.
 11 See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997); Chein v. Shumsky, 373 F.3d 978, 983
 12 (9th Cir. 2004) (en banc). Under AEDPA, a federal court may review a habeas corpus
 13 petition by a person in custody pursuant to a state court judgment "only on the ground that
 14 he is in custody in violation of the Constitution or laws or treaties of the United States."
 15 28 U.S.C. § 2254(a); Cullen v. Pinholster, 563 U.S. 170, 181 (2011). A habeas petition
 16 that includes a claim that has been adjudicated on the merits by the state courts will not be
 17 granted "unless the adjudication of the claim—

18 (1) resulted in a decision that was contrary to, or involved an unreasonable
 19 application of, clearly established Federal law, as determined by the Supreme
 Court of the United States; or

20 (2) resulted in a decision that was based on an unreasonable determination of
 21 the facts in light of the evidence presented in the State court proceeding."

22 28 U.S.C. § 2254(d)(1)-(2); Pinholster, 563 U.S. at 181. "AEDPA thus imposes a highly
 23 deferential standard for evaluating state-court rulings, and demands that state-court
 24 decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773 (2010)
 25 (internal quotation marks omitted). The petitioner carries the burden of proof. See
Pinholster, 563 U.S. at 181.

26 For purposes of 28 U.S.C. § 2254(d)(1), a state-court decision is "contrary to" the
 27 Supreme Court's clearly established precedent if "the state court applies a rule different
 28

1 from the governing law set forth in [the Supreme Court] cases, or if it decides a case
 2 differently than [the Supreme Court has] done on a set of materially indistinguishable
 3 facts.” Bell v. Cone, 535 U.S. 685, 694 (2002). A state-court decision is “an unreasonable
 4 application” of the Supreme Court’s clearly established precedent if “the state court
 5 identifies the correct governing legal rule from [the Supreme] Court’s cases but
 6 unreasonably applies it to the facts of the particular state prisoner’s case” or “if the state
 7 court either unreasonably extends a legal principle from [Supreme Court’s] precedent to a
 8 new context where it should not apply or unreasonably refuses to extend that principle to a
 9 new context where it should apply.” Williams v. Taylor, 529 U.S. 362, 407 (2000).
 10 Moreover, under the “unreasonable application” prong, the state-court decision must have
 11 been more than incorrect or erroneous; it must have been objectively unreasonable. See
 12 Wiggins v. Smith, 539 U.S. 510, 520 (2003); Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

13 In conducting an analysis under AEDPA, the federal habeas court looks to the last
 14 reasoned state-court decision. See Castellanos v. Small, 766 F.3d 1137, 1145 (9th Cir.
 15 2014); Murray v. Schriro, 745 F.3d 984, 996 (9th Cir. 2014). Where there is an unexplained
 16 decision from the state’s highest court, the federal habeas court “looks through” to the last
 17 reasoned state-court decision and presumes that the unexplained opinion rests upon the
 18 same ground. Ylst v. Nunnemaker, 501 U.S. 797, 805–06 (1991).

19 Here, Petitioner bases his petition on insufficiency of evidence, under the standard
 20 in Jackson v. Virginia, 443 U.S. 307, 309 (1979). The Due Process Clause of the
 21 Fourteenth Amendment prohibits the criminal conviction of any person except upon proof
 22 of guilt beyond a reasonable doubt. See id. Under Jackson, a habeas petitioner challenging
 23 the sufficiency of the evidence to support his state criminal conviction may obtain relief
 24 only if “it is found that upon the record evidence adduced at trial no rational trier of fact
 25 could have found proof of guilt beyond a reasonable doubt.” Id. at 324. Therefore, “the
 26 relevant question is whether, after viewing the evidence in the light most favorable to the
 27 prosecution, any rational trier of fact could have found the essential elements of the crime
 28 beyond a reasonable doubt.” Id. at 319.

1 In applying Jackson's standard, federal courts must look to state law for the
 2 substantive elements of the criminal offense. See id. at 324 n.16; Coleman v. Johnson, 132
 3 S. Ct. 2060, 2064 (2012) (per curiam). California law provides that "a person aids and
 4 abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful
 5 purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or
 6 facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages
 7 or instigates, the commission of the crime." People v. Beeman, 35 Cal. 3d 547, 561 (1984).

8 "Jackson claims face a high bar in federal habeas proceedings because they are
 9 subject to two layers of judicial deference." Coleman, 132 S. Ct. at 2062. First, on direct
 10 appeal, a reviewing court can only set aside the jury's verdict on the ground of insufficient
 11 evidence if no rational trier of fact could have agreed with the jury. See Cavazos v. Smith,
 12 132 S. Ct. 2, 4 (2011) (per curiam). Second, on collateral review, a federal court can only
 13 overturn a state court's decision rejecting a sufficiency of the evidence challenge if the
 14 state court's decision was objectively unreasonable, but can not do so simply because the
 15 federal court disagrees with the state court. See id. The Ninth Circuit also adopts an
 16 additional degree of deference when applying Jackson's standard on sufficiency of
 17 evidence in habeas petitions. See Boyer v. Belleque, 659 F.3d 957, 964–65 (9th Cir. 2011);
 18 Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005).

19 II. Analysis

20 Petitioner argues that there is insufficient evidence to support his conviction of
 21 attempted murder, (Doc. No. 1), and that the California Court of Appeal's decision
 22 affirming his conviction is an unreasonable application of Jackson's "no rational trier of
 23 fact" standard, (Doc. No. 9). Petitioner contends that he did not know of Martinez's
 24 unlawful purpose, and that he did not assist or encourage Martinez in committing the crime.
 25 (Doc. No. 1 at 25.) Under Jackson, this Court looks to the substantive requirements of state
 26 law to evaluate the sufficiency of the evidence. See 443 U.S. at 324 n.16. Under California
 27 law, a person aids and abets the commission of a crime when he acts with knowledge of
 28 the unlawful purpose of the perpetrator and with the intent or purpose of committing,

1 encouraging, or facilitating the commission of the offense, and his act or advice aids,
 2 promotes, encourages, or instigates the commission of the crime. See Beeman, 35 Cal. 3d
 3 at 561.

4 The California Court of Appeal reasoned that Petitioner's companionship with co-
 5 defendant Martinez during the offense, as well as their conduct before and after the offense,
 6 could have led the jury to draw reasonable inferences and find Petitioner liable as an aider
 7 and abettor. (Doc. No. 6-14, Lodg. No. 5 at 24–26.) The Court of Appeal relied on
 8 evidence showing that Petitioner "purchased beer with Martinez hours before the shooting
 9 and accompanied Martinez into rival gang territory, where one of the men issued a verbal
 10 challenge to Romero before Martinez shot him." (Id. at 25.) Agent Cruz, who chased
 11 down the Solara fleeing from the crime scene, saw Petitioner in the passenger seat. (Id.
 12 at 6.) Surveillance footage from the bar showed two men walking out and running down
 13 the alley around the time of the shooting, and clothes worn by one of the men matched
 14 those found in Petitioner's home. (Id. at 7–8.) "[Petitioner] did not independently happen
 15 by the scene of the crime. Rather, Martinez and [Petitioner] knowingly approached and
 16 challenged Romero, acting in concert." (Id. at 25.) Additionally, the prosecution's expert
 17 testimony supported the theory that "[Petitioner] and Martinez went into rival gang
 18 territory together, with the intention of shooting a member or members of a rival gang, on
 19 behalf of their own gang." (Id. at 26.) "Since there was no evidence that [Petitioner] was
 20 surprised by Martinez's conduct or that he was afraid to interfere with Martinez, the jury
 21 could reasonably conclude that [Petitioner] was there to participate and intimidate
 22 Romero." (Id.)

23 Petitioner argues that there is a lack of direct evidence on his intent to encourage or
 24 facilitate the attempted murder, and that it is unreasonable for the state court to affirm his
 25 conviction based on circumstantial evidence. (Doc. No. 1 at 35–36.) As the California
 26 Court of Appeal recognized, however, "[i]ntent is rarely susceptible of direct proof and
 27 usually must be inferred from the facts and circumstances surrounding the offense." People
 28 v. Pre, 117 Cal. App. 4th 413, 420 (2004); see also United States v. Cordova Barajas, 360

1 F.3d 1037, 1041 (9th Cir. 2004) (“[C]ircumstantial evidence alone can be sufficient to
2 demonstrate a defendant’s guilt.”); Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995)
3 (“[C]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a
4 conviction.”). Accordingly, the Court of Appeal concluded that “[the evidence] is
5 sufficient to support the finding that [Petitioner] aided and abetted the attempted murder of
6 Romero.” (Id. at 25.)

7 Affording due respect to the fact-finding role of the jury and the state court’s
8 judgment, this Court concludes that the evidence at Petitioner’s trial is sufficient to
9 establish his knowledge, intent, and participation in the attempted murder of Romero. See
10 Beeman, 35 Cal. 3d. at 561. On the basis of the trial evidence, a rational jury could infer
11 that Petitioner accompanied a fellow gang member into rival gang territory for the purposes
12 of committing crimes, and that they verbally challenged and shot the victim multiple times
13 before fleeing the scene together. As a result, this Court concludes that there is sufficient
14 evidence as required by due process to support Petitioner’s conviction, and that the
15 California Court of Appeal decision is a reasonable application of the Jackson standard.

16 **Conclusion**

17 For the foregoing reasons, the Court denies Petitioner’s petition for a writ of habeas
18 corpus and adopts the magistrate judge’s report and recommendation. (Doc. Nos. 1, 8.)
19 Additionally, since the Court concludes that reasonable jurists would not find the Court’s
20 assessment of Petitioner’s claim debatable or wrong, the Court denies Petitioner a
21 certificate of appealability. See 28 U.S.C. § 2253(c)(2); see also Slack v. McDaniel, 529
22 U.S. 473, 484 (2000) (certificate of appealability may issue only if reasonable jurists would
23 find the district court’s assessment of the constitutional claims debatable or wrong).

24 **IT IS SO ORDERED.**

25 DATED: June 7, 2016

26
27
28 
MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT